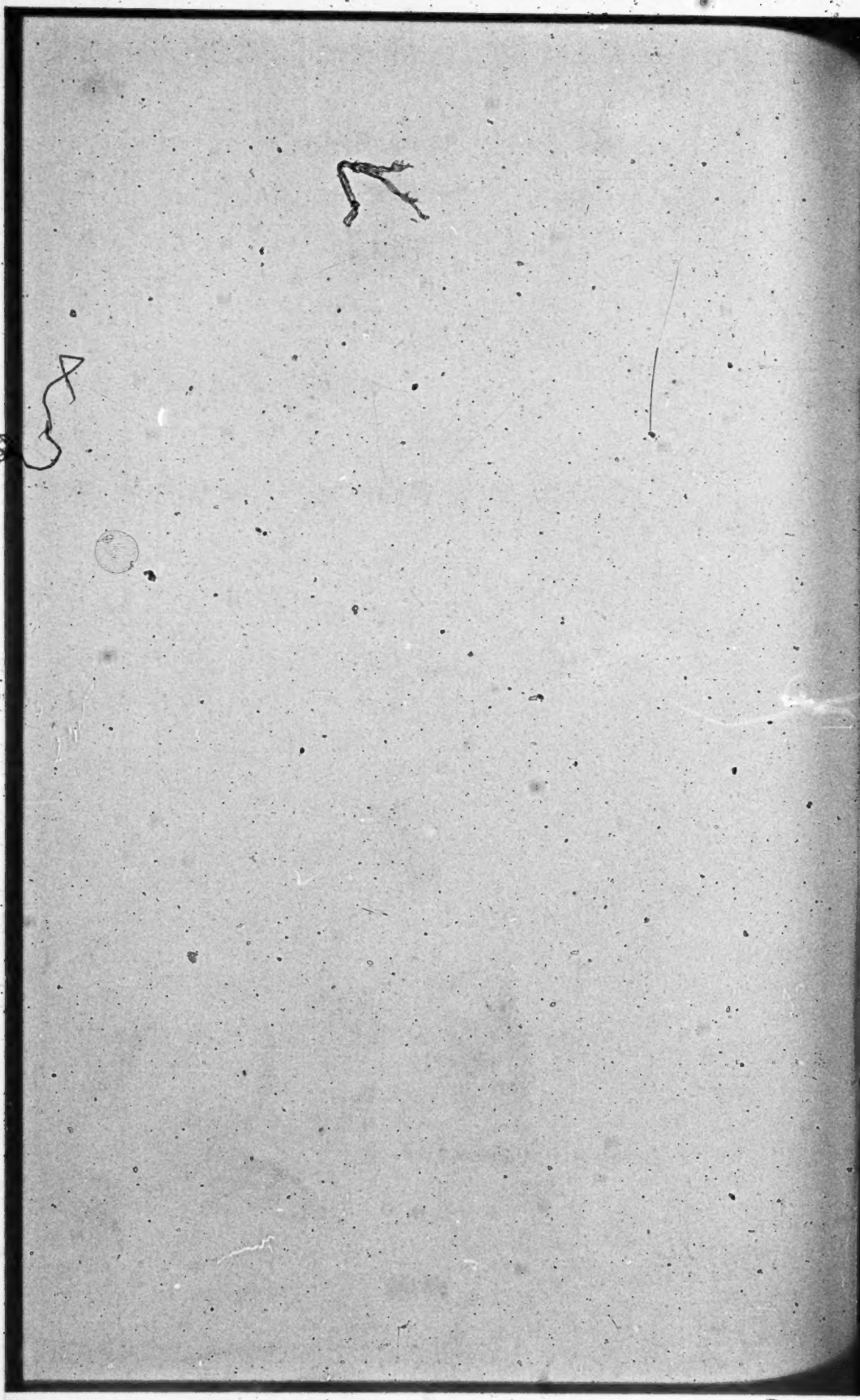

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In the Supreme Court of the United States

OCTOBER TERM, 1930.

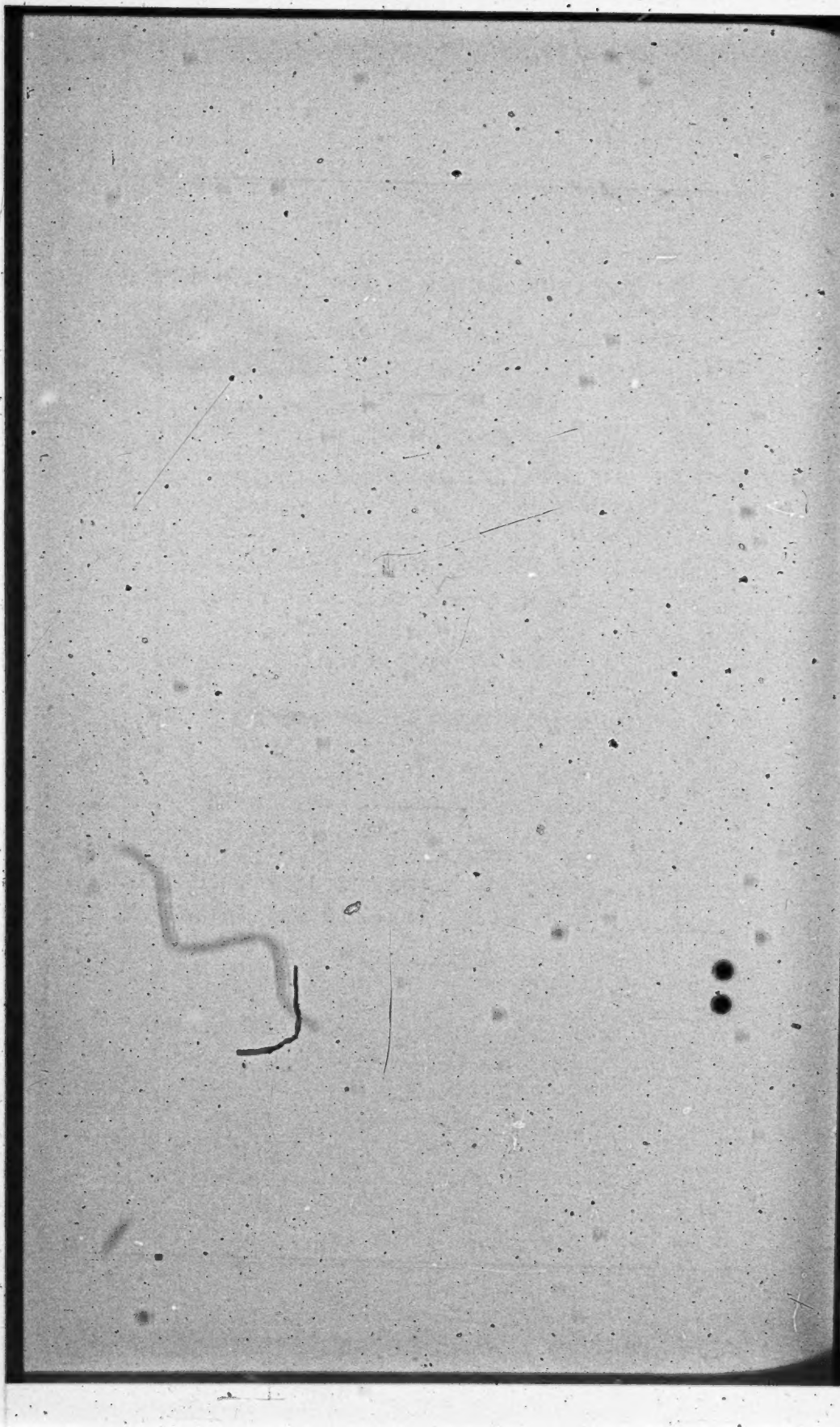
No. 362

GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

v.

CHAMPLIN REFINING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF



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PETITIONER,

v.

CHAMPLIN REFINING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Gasoline Products Company, Inc., the plaintiff below and hereinafter referred to as the plaintiff, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above entitled cause on May 21, 1930.

STATEMENT OF FACTS

This case involves the correction of rulings of the Circuit Court of Appeals for the First Circuit relating to the

conduct of jury trials in the United States Courts, its interpretation of statutes of the States of Maine and Oklahoma in a manner inconsistent with the applicable State Court decisions, and the application of the rules laid down by the decisions of this Court as to the evidence warranting the submission of a case to the jury and the recovery of loss of anticipated profits upon the breach of a contract.

The controversy relates entirely to a defense set up by the defendant in a plea of "counterclaim in set-off", the defendant not having contested its liability to pay the plaintiff's claim.

The case was commenced in the United States District Court for the District of Maine, Southern Division, on March 18, 1927, as a suit in equity based upon a license contract dated February 26, 1926 (Record pp. 7-20), between the plaintiff and the defendant, under which the plaintiff licensed the defendant to construct and operate at the defendant's oil refinery in Enid, Oklahoma, two Cross cracking units, plaintiff praying for an accounting of the amount of oil treated in said units and for a decree for the royalties at ten cents per barrel payable by the defendant under the license agreement. The defendant, by its answer, admitted the making of the license contract, the construction of the cracking units and the treatment therein of a specified quantity of oil. Its answer also set up a counterclaim alleging the making and breach by the plaintiff of a written contract for the construction of a "Cross vapor phase treating system tower" to treat the gasoline produced by the two Cross cracking units. The plaintiff having moved to strike out the counterclaim, defendant made a motion to

transfer the case to the law side of the Court, which motion was granted.

Plaintiff thereupon substituted for its bill in equity a declaration at law in a plea of covenant broken (Record pp. 4-7) repeating substantially the allegations of the original bill. Defendant filed its plea of general issue, adding thereto what it termed its "counterclaim in set-off" (Record pp. 20-45).

The counterclaim contains two counts. In both, the defendant admits the making of the license contract, the construction of the Cross cracking units and the operation thereof in accordance with the license, and in both, it also alleges the making of two other contracts relating to the Cross cracking units (Exhibits 1 and 2 to plea, Record pp. 31-43), one for the construction thereof by the M. W. Kellogg Company, the other for the guarantee of the physical performance thereof by the plaintiff. In the *first count* (Record pp. 22-26) defendant alleges the existence of a contract for the construction of a Cross vapor phase system treating tower, arising from an *oral* proposal made by Welling, the Vice-President of the plaintiff, in January 1926, accepted by the defendant by the defendant's execution of the three contracts relating to the cracking units (which occurred in March 1926). The *second count* (Record pp. 26-31) is substantially identical with the first except that it alleges the existence of a contract for the construction of a Cross vapor phase system treating tower, arising from a *written* proposal to defendant dated February 6, 1926, signed by Cross Engineering Company (Exhibit 3 to the plea, Record pp. 44, 45) accepted orally by the defendant through its President on February 6, 1926,

and confirmed by the defendant's execution of the three contracts relating to the cracking units.

The elements of damage asserted in both counts of defendant's counterclaim in set-off were losses sustained on storage of gas-oil in anticipation of construction of the cracking plant, losses on accumulation of cracked gasoline produced from the cracking units before completion of substitute treating apparatus to treat the same, loss due to evaporation of gasoline in storage, extra labor, fuel and insurance, loss of interest on money if would have received on the finished product, loss incident to shutting down its plant because of lack of treating apparatus, and loss of anticipated profits upon the sale of the cracked gasoline (due to fall in market value), all to a total of $302,316.55.

The first trial of the case took place at the April term 1928 before a jury. Defendant's liability for royalties having been stipulated, defendant offered testimony on its counterclaim and at the close of such testimony plaintiff made a motion, somewhat analogous to a motion for nonsuit, that the defendant's account in set-off and all the testimony offered thereunder be stricken from the record on the ground that said testimony failed to establish any claim or right of action by the defendant against the plaintiff. The motion was granted over defendant's exception and the defendant appealed from the resulting judgment for the plaintiff to the Circuit Court of Appeals for the First Circuit.

On this appeal the issues were:

(1) Whether there was evidence which should have been submitted to the jury on the question of the

existence of the alleged contract for treating apparatus and the breach thereof by the plaintiff and, if so, as to the alleged damage resulting from such breach; and

(2) Whether under the Maine statute on set-off such an unliquidated claim for damages could properly be asserted by way of set-off.

The Circuit Court of Appeals sustained the defendant's exceptions and reversed the judgment, sending the case back for a new trial (29 Fed. 2nd, 331). The majority opinion held that defendant's claim was properly pleaded in set-off under the Maine statute, but Judge JOHNSON, the only Maine member of the Court, dissented, holding that the requirement of the Maine statute on set-off in regard to damages was not merely technical as suggested by the majority, but that it could not be complied with if the damages alleged were not capable of ascertainment.

The case was again tried to a jury in the April term 1929.

Briefly the facts disclosed by the testimony at this second trial with reference to the counterclaim were as follows: Defendant, which had been operating a refinery in Enid, Oklahoma, decided in 1925 to install a cracking process for the purpose of increasing the proportion of gasoline obtainable from the crude oil treated and thereupon made a thorough investigation of a number of patented cracking processes, including the one licensed by the plaintiff under its patents known as the "Cross Cracking Process". Negotiations with the plaintiff or its representatives commenced in March 1925 and as a result of such negotiations and investigation, defendant definitely selected

the Cross Cracking Process and in late January or early February 1926, approved in general outline the three contracts later executed, that is, the license agreement sued on by the plaintiff, the construction contract providing for the construction of the Cross cracking units by the M. W. Kellogg Company and the guarantee contract in which the plaintiff guaranteed the physical performance of the cracking units. There were numerous conferences in Enid and New York, as well as telephone conversations and correspondence, relating to these three contracts and the same were revised and signed by the defendant in Enid on February 26, 1926, thereafter further revised and re-signed by the plaintiff and by the Kellogg Company in New York and finally re-executed by the defendant in Enid, Oklahoma, on March 20, 1926. The Cross cracking units were constructed in accordance with the contracts, accepted on September 16, 1926, and have been operated continuously since that date, complying in all respects with the contracts.

In December 1925, discussions were started between the defendant and P. C. Keith, Jr., and Harcourt, his predecessor, who were handling the negotiations on the part of the plaintiff and the Kellogg Company, as to what means should be adopted for treating the cracked gasoline produced from the cracking units to make the same merchantable from the points of view of color, odor and freedom from sulphur. Keith and Harcourt first recommended the Gray vapor phase treating process, which was then in successful commercial operation in a number of plants, including several Cross cracking plants like defendant's, examined by the defendant. The defendant was solicited by the owner of the Gray process and was familiar with its operation.

In December 1925 or January 1926, Keith brought to the attention of the defendant an experimental treating process still in the laboratory stage of development, invented by the Doctors Cross, the inventors after whom the Cross Cracking Process was named, and stated that the Cross Development Corporation owning the patents on the Cross vapor phase treating process would be prepared to finance the installation of an initial commercial unit which would be royalty free, the unit to be paid for by the defendant if it proved satisfactory. There was a sharp conflict of testimony as to whether the offer was for one unit or for three, which would be necessary to handle the output of two cracking units. (Record pp. 56-58, 141, 372-377, 591-595.) The defendant's plea alleges a contract for one unit but its testimony pointed to an offer of three.

The offer of Keith was confirmed by Welling, a Vice-President of Cross Development Corporation and also of the plaintiff, at an interview in Enid in the end of January 1926 and was further confirmed by the proposal of February 6th signed by Keith as Vice-President of Cross Engineering Corporation, a separate engineering concern owned by the Doctors Cross in Kansas City.

There was no contention that the offer of Welling on behalf of Cross Development Corporation or the written proposal of Cross Engineering Company was ever accepted in writing and the plaintiff's contention both in the District Court and in the Circuit Court of Appeals was that there was no evidence of the acceptance in any manner of either proposal. The testimony showed that the question of treating in the defendant's plant was discussed repeatedly during the period from December 1925 to October 1926.

Throughout this period the defendant was repeatedly warned that the Cross vapor phase treating process was purely a laboratory affair which had never been used or even tried commercially and Harvison of the Kellogg Company and others strongly advised the defendant to adopt the Gray treating process or some other process which had been used commercially and found satisfactory (Record pp. 372, 374, 594, 601, 602.) In May 1926, no plans had as yet been prepared for treating apparatus and the defendant sent representatives to New York to go into the matter. There they were advised by counsel that the Cross vapor phase treating process would probably infringe the Gray patents. The defendant's representatives interviewed Gray, who repeated the warning, and told Gray that they were then considering installing either the Gray treating process or the ordinary unpatented treating process then in general use, of acid treating and re-running. In June Keith ascertained from the Doctors Cross, and informed the defendant, that the Cross vapor phase treating process would be unduly expensive to operate and suggested the adoption either of the Gray process or of the Cross liquid phase treating process then in successful operation at several refineries (Record pp. 283-285, 443-444, 622-623).

In July 1926, a sharp controversy arose between the defendant on the one side and Keith, the plaintiff and the M. W. Kellogg Company on the other side, as to what should be done to provide treating apparatus to handle the output of the Cross cracking units then nearing completion. The defendant demanded the installation of three Cross vapor phase treating towers, though the original proposal of February 6th was for only one such tower (Rec-

ord pp. 44-45); and defendant also demanded that the plaintiff should guarantee that the cost of operation should not exceed that of the Gray process though the plaintiff had never made any undertakings as to such operating cost. The plaintiff offered to proceed with the proposal of February 6, 1926 if defendant would accept the same but this the defendant refused to do.

Upon at least four occasions, July 17th, July 27th, August 13th and September 18th, 1926, Keith offered the defendant the alternative of accepting the written proposal of February 6th amplified to include three towers instead of one or of adopting one of two alternative propositions, either installing the Gray treating process with substantial financial assistance from the Kellogg Company on the matter of royalties and construction cost, or installing treating towers on plans to be approved by defendant, but without patent protection. The defendant on each occasion refused all three propositions and insisted on the Cross vapor phase treating process plus a guarantee as to the operating expense thereof (Record pp. 115, 127, 128, 626-635). On August 13, 1926 defendant advised plaintiff that it would build its own treating process and undertook so to do (Defendant's Exhibit 23, Record p. 97). The defendant then spent some time in endeavoring to develop a type of treating tower that would not infringe the Gray patents and finally in October or November it prepared plans upon the basis of an old German patent and the three towers were completed in February 1927, four months and a half after completion of the cracking units.

During this period from September 1926 to February 1927, the defendant operated the cracking units and stored

the cracked gasoline although the market for gasoline was steadily declining. It also stored an equal amount of straight-run gasoline manufactured in its skimming plant and the principal loss of profits claimed by the defendant was the sum of $179,459.14 asserted to represent the difference between the market value of the cracked gasoline between the dates of manufacture and the date when the same was actually treated and sold after the completion of defendant's treating apparatus (Defendant's Exhibit 61). Damages were also claimed for the alleged excess cost of the treating apparatus constructed by the defendant over the estimated cost of the Cross vapor phase treating towers (Record p. 255) and for loss of interest (Defendant's Exhibit 62) and other items due to the delay in completion of the treating towers.

The plaintiff introduced testimony showing that there were five alternative methods for treating the cracked gasoline produced in the cracking units during the four months' period which could have been installed and used with substantially no loss to the defendant and could have been completed within from ten days' to six weeks' time, so that the losses claimed by the defendant need not have been incurred had the defendant used reasonable diligence to prevent the same (Record pp. 474-477). There was a conflict of expert testimony as to the availability and cost of some of these methods of avoiding the loss (Testimony of Dr. Cross for plaintiff, Record pp. 458-551 and of Mr. Koch for defendant, Record pp. 664-689).

The principal issue of the case was whether the undisputed testimony tended to prove the existence of any contract whatever entered into between the plaintiff and the

defendant for the erection of treating apparatus. If a contract was entered into, there was a further controversy as to its terms, notably as to whether it related to one treating tower or three, the date of its making and the date of its breach, if any. The question as to what damages, if any, were recoverable by the defendant obviously depended upon the terms of the alleged contract, particularly with respect to the number of towers involved, the date when said contract was made and the date when it was breached. The date of making the contract was relevant in interpreting its terms particularly with regard to prospective profits, and the date of breach was particularly important in its bearing on the duty and ability of the defendant to minimize the damages alleged.

The issues as to liability and damage were inseparable. As to loss of profits, the most important element of damage, the contemplation of the parties at the time of entering into the alleged contract, was all important under the familiar rule in *Hadley* v. *Baxendale*, 9 Exch. 341.

At the close of all the testimony plaintiff moved for a directed verdict in its favor for the amount sued for on the ground that said indebtedness had been confessed and that no offsetting indebtedness had been shown. The Court denied the motion and left the case to the jury, which returned the following verdict (Record pp. 808-809):

> "The jury find that the amount due the Plaintiff on its writ is Sixty-one Thousand Five Hundred Thirty Dollars and Fifty-six Cents ($61,530.56);
>
> "And that the amount due the Defendant on its account in set-off is Forty Thousand Nine Hundred Eighty Dollars and Fifty-nine Cents ($40,980.59);

"Leaving a balance due the Plaintiff in the sum of Twenty Thousand Five Hundred Forty-nine Dollars and Ninety-seven Cents ($20,549.97)."

On this verdict judgment was entered for the balance, amounting together with interest and costs to a total of $23,032.85 (Record p. 825). Both parties appealed. This was the only verdict rendered by the jury and though it implies a belief on the part of the jury in the existence of some contract for treating apparatus it does not appear therefrom and there is no way of telling whether this verdict was rendered on the first count of the writ or on the second count or what the jury believed to be the terms of said contract, the date of its making or the date of its breach.

On this second appeal the only questions raised by the exceptions of either party again related to the defendant's counterclaim.

The principal issues raised by the plaintiff's exceptions were:

(1) Whether on all the evidence, which was much more ample than the evidence at the first trial, the Court should have left to the jury the question as to the existence of the contract and its breach by the plaintiff.

(2) Whether on all the evidence the Court should have left to the jury the question as to whether any loss was sustained by the defendant as a result of the alleged breach of such contract.

The principal issues raised by the defendant's exceptions were as to whether the Court's charge on the question of

damages from loss of profits and the allowance of interest upon such damages was correct as a matter of law.

At the second trial the plaintiff again excepted to the admission of any testimony upon defendant's counterclaim in set-off on the ground that the same was improper under the Maine statute (Rev. Stat. of Maine (1916), chapter 87, section 75), which allows to be set off only

> "a demand * * *, founded on a * * * contract express or implied, * * * for a liquidated sum, or for one ascertainable by calculation."

This exception (Record p. 47) was not pressed a second time before the Circuit Court of Appeals on account of the decision of that Court on the first appeal.

On April 7, 1930, the Circuit Court of Appeals handed down a second decision (reported in 39 Fed. 2nd, 521) overruling all of the exceptions of the plaintiff and sustaining the exceptions of the defendant on three points only, first, the inclusion in the charge of a ruling that loss of profits must not be "in any degree uncertain, speculative, contingent or conjectural", and second, the failure to direct the allowance of interest on the excess cost of the substitute treating towers, and third, the failure to allow the jury in its discretion to allow interest on loss of profits. The decision vacated the judgment in respect of damages only and directed the case to stand for a new trial *on defendant's damages only*. Judge WILSON, recently Chief Justice of the Supreme Court of Maine, concurred "in the reasons for sending this case back for further hearing on the question of the defendant's damages", but expressed himself as not caring to be understood "as thereby approving the

view that the defendant's claim is a proper account in set-off under section 75 of chapter 87 of the Maine statutes".

The plaintiff petitioned for re-hearing (Record pp. 851-852) on the ground that the mandate of the Circuit Court of Appeals sending the case back for retrial on damages only, in effect breached the plaintiff's right to a jury trial on the issues of the case, also on the further grounds that the Circuit Court of Appeals had erred in applying the Oklahoma rule on the allowance of interest on unliquidated damages and had mistakenly ordered a new trial on account of merely trivial errors in the charge of the learned District Judge. The petition for re-hearing was denied without opinion, the Court modifying the mandate slightly in point of form but not in substance. This decision was handed down on May 21, 1930.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review in conformity with the provisions of the act of Congress in such case made and provided.

Your petitioner presents herewith, as part of this petition, a transcript of the record in the Circuit Court of Appeals, together with a record of the proceedings in said Court.

SPECIFICATION OF ERRORS

Your petitioner insists that the Circuit Court of Appeals erred—

1. In depriving the plaintiff of its constitutional right to jury trial by remanding the case to the District Court for re-trial on the question of defendant's damages only.

2. In allowing the defendant to assert in an account in set-off under the Statutes of Maine its demand for unliquidated damages for the breach of this contract.

3. In deciding that under the statutes of Oklahoma and the decisions of Oklahoma courts the jury might in its discretion assess interest upon unliquidated damages.

4. In deciding that there was evidence to go to the jury of the existence of a contract.

5. In deciding that "the defendant did, on the weight of evidence, make out a claim for a substantial sum of lost profits as damages".

REASONS FOR GRANTING THE WRIT

The reasons why the writ should issue are:

1. The effect of the mandate of the Circuit Court of Appeals is to preclude from the consideration of any jury the existence and nature of the contract alleged to have been breached and thus to deny to the petitioner its constitutional right to jury trial as determined in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, and many other cases.

2. The decision of the Circuit Court of Appeals in granting a new trial on damages only is squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *McKeon* v. *Central Stamping Co.*, 264 Fed. 385, which holds such a partial retrial to deny the constitutional right of jury trial. This conflict between the first

and third circuits should be resolved by a decision of this Court. (Rule 38 (5) (b), United States Supreme Court.)

3. The Circuit Court of Appeals for the First Circuit has construed the Maine statute as to set-off of demands, which is an important question of Maine law, in a manner squarely in conflict with the decisions of the Supreme Judicial Court of Maine. The Judges of said Circuit Court of Appeals familiar with the Maine statute and the decisions thereunder have so recognized.

4. The Circuit Court of Appeals in applying the Oklahoma law as to interest on unliquidated damages has overlooked the Oklahoma statute and cited an Oklahoma case in support of its opinion when its holding is the reverse.

5. The decision of the Circuit Court of Appeals upon the important question of general law as to whether or not the evidence in the case warranted its submission to the jury is untenable and in conflict with the great weight of authority.

6. The decision of the Circuit Court of Appeals upon the important question of general law as to the evidence necessary to establish a claim for loss of profits upon breach of a contract is untenable and in conflict with the weight of authority.

PRAYER

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated a

full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case which was entitled in that Court: Gasoline Products Company, Inc., plaintiff-appellant, *vs.* Champlin Refining Company, defendant-appellee, #2415, and Champlin Refining Company, defendant-appellant, *vs.* Gasoline Products Company, Inc., plaintiff-appellee, #2416, to the end that said cause may be reviewed and determined by this Court as provided by section 240 of the Judicial Code, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgments of said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

GASOLINE PRODUCTS COMPANY, INC.,

By JOHN B. MARSH,
ROBERT HALE,
Counsel for Petitioner.

August, 1930.

STATE OF NEW YORK,
County of New York, } ss.:

JOHN B. MARSH, being duly sworn, says that he is counsel for Gasoline Products Company, Inc., the petitioner, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

JOHN B. MARSH

Sworn to and subscribed before me,
this 16th day of August, A. D. 1930.

Notary Public.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS OF THE COURT BELOW

Opinions of the Circuit Court of Appeals for the First Circuit are found respectively in 29 Federal 2nd, 331, and 39 Federal 2nd, 521 (Record pp. 844a-851). The Court rendered no opinion on the plaintiff's petition for re-hearing.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was rendered on May 21, 1930 (Record p. 853).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 now appearing as section 347 (a) of Title 28 of the United States Code annotated.

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

SUMMARY OF THE ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN REMANDING THE CASE TO THE DISTRICT COURT FOR RETRIAL "ON DEFENDANT'S DAMAGES ONLY" HAS ABRIDGED THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO JURY TRIAL.

II.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS ERRED IN APPLYING THE MAINE LAW OF SET-OFF.

III.

THE CIRCUIT COURT OF APPEALS IN APPLYING THE OKLAHOMA LAW AS TO INTEREST ON UNLIQUIDATED DAMAGES HAS OVERLOOKED THE OKLAHOMA STATUTE AND CITED AN OKLAHOMA CASE IN SUPPORT OF ITS OPINION WHEN ITS HOLDING IS THE REVERSE.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO WHETHER THE EVIDENCE IN THE CASE WARRANTED ITS SUBMISSION TO THE JURY IS UNTENABLE AND IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY.

V.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THAT THE DEFENDANT DID, ON THE WEIGHT OF EVIDENCE, MAKE OUT A CLAIM FOR A SUBSTANTIAL SUM OF LOST PROFITS AS DAMAGES".

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN REMANDING THE CASE TO THE DISTRICT COURT FOR RETRIAL "ON DEFENDANT'S DAMAGES ONLY" HAS ABRIDGED THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO JURY TRIAL.

The seventh amendment to the Federal Constitution reads as follows:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.*" (Italics ours.)

It has repeatedly been held that the rules referred to in this amendment are the rules of common law as understood in England at the time when the Federal Constitution and the seventh amendment were adopted. See *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 67 L. Ed. 232.

IT IS THE GENERAL RULE THAT UPON THE REVERSAL OF A JUDGMENT A NEW TRIAL UPON THE WHOLE CASE SHOULD BE ORDERED.

In *Slocum* v. *New York Life Insurance Company, supra*, a Circuit Court jury had given a verdict for the plaintiff after the Court had denied a motion for directed verdict. The Circuit Court of Appeals held erroneous the denial of the motion for directed verdict and entered judgment for the defendant under a state statute authorizing this procedure. This Court held it error on the part of the Circuit Court of Appeals to direct the judgment for defendant instead of ordering a new trial.

Mr. Justice VAN DEVANTER, after discussing the opinions in *United States* v. *Wonson*, 1 Gall. 5, Federal Cases #16750; *Parsons* v. *Bedford*, 3 Peters 433, 7 L. Ed. 732; *Walker* v. *New Mexico & Southern Pacific Railroad Company*, 165 U. S. 593, 41 L. Ed. 837; and *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, said:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the

rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury.

* * *

"In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.

* * *

"In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the

state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."

The Circuit Court of Appeals for the Third Circuit has held in *McKeon* v. *Central Stamping Company*, 264 Fed. 385, that a practice act of the State of New Jersey authorizing a new trial in respect to damages only is not applicable in the Federal courts, by reason of the seventh amendment. The action in this case was in tort for personal injury suffered by the minor plaintiff through the alleged negligence of the defendant's employees. The plaintiff recovered a verdict unsatisfactory to him in amount and the trial judge under the New Jersey statute in question granted a right to retrial restricted to the sole issue of the amount of damages sustained by the infant plaintiff. At this new trial the defendant offered to prove its entire defense, but the proof was excluded and verdict on the restricted issue was rendered. Judgment was entered thereon and defendant prosecuted his writ of error. Judge BUFFINGTON, in reversing the judgment and ordering a completely new trial, uses the following language:

"The question thus raised" (on the seventh amendment) "is basic in character. Such divided verdict, namely, one where 24 men have, in two separate juries of 12 each, passed on parts of the issues on which the judgment rests, and where neither the 24 collectively and neither of the 12 singly have passed on all the issues which support the judgment, constitutes such a departure from the unvarying trial course followed in our federal courts that, in the absence of any opinion on the record by the trial judge warranting such a course, it becomes the imperative duty of this tribunal to justify, or by judicial opinion and judicial decree forbid, a departure from the course of trial that has obtained in historic continuity in the courts of the United States from the foundation of the government.

* * *

"What do these few simple words, used in the Constitution, 'the right of trial by jury shall be preserved,' mean? Manifestly, in answering that question, we naturally ask: What did these words mean to those who used them when they were written into the Constitution? Now, in construing those words, one basic fact challenges our attention, namely, that there was something that was then preserved, for preservation implies the continuance of what previously existed. Preservation is not creation; it is the saving that which already exists. Seeing, then, we have here a word which implies the existence of something already in being, we find the call of the words 'preserved,' 'shall be preserved,' answered by a definite thing, to wit, 'the right of trial by jury.' And it will be noted that we are not dealing with an indefinite, but a very definite, concrete, well-understood thing, that at that time had such a recognized meaning that it was described, not

as 'a right of trial by jury,' not as some or any right of trial by jury, but as 'the right of trial by jury.'

* * *

"Addressing ourselves, then, to the question of what was this trial by jury as then fixed by the common law of Great Britain, it will be seen that the jury of the common law of England consisted of 12 men, that it heard all the evidence pertinent to the issue raised by the pleadings, it returned a single verdict, and upon such verdict judgment was entered, and if a new trial is granted it is a trial of the whole case.

* * *

"Seeing, then, that text-book writers on the common law of England and the Year Books and Reports of that country show no instance where trial by jury at common law has been other than a trial by one jury of all the issues involved in the case, and that the federal courts have preserved this common-law practice of jury trial in unbroken historic continuity in fulfillment of the constitutional guaranty, both in criminal and civil cases, we are justified in holding, also, that the action of the court below in following the New Jersey statute was not warranted by the federal conformity statute cited, and this for the reason that new trials, under the federal decisions, are not governed by the conformity statute."

We submit that the foregoing case is correctly decided and that it governs the plaintiff's right in the case at bar.

It is true that there are federal decisions inconsistent with *McKeon* v. *Central Stamping Company*, three of them having been decided by the Circuit Court of Appeals for the First Circuit: *Farrar* v. *Wheeler*, 145 Fed. 482; *Calaf*

v. *Fernandez*, 239 Fed. 795; *F. E. Atteaux & Co.* v. *Pancreon Mfg. Co.*, 22 Fed. 2nd, 749.

On motion for rehearing in *Farrar* v. *Wheeler*, 145 Fed. at p. 486, Judge PUTNAM said:

> "This is an action of tort for personal injuries, in which the judgment below was in favor of the plaintiff on a verdict of a jury. The suit was brought by a minor for an injury to himself, and, in assessing damages, the jury were permitted to allow him for loss of time, services, and earning capacity during his minority, in addition to what might be assessed for his physical sufferings. The only error was in allowing damages for loss of time, services, and earning capacity during his minority. In all other respects the proceedings at the trial were found to be correct. We held that the case should go back for a new trial on the issue of damages alone, and judgment was entered accordingly. *The plaintiff in error, who was the defendant below, has now filed a petition for rehearing, in which he claims that, although the error related only to the rule of damages, the entire verdict must, or should in justice, be set aside, and that a venire de novo must, or should in justice, be ordered covering all the questions submitted to the jury. This is undoubtedly the rule at common law.* Of course, in criminal proceedings at common law the rule is even more rigid. This, however, is all changed, so far as we are concerned, by various acts of Congress, of which the last was that of June 1, 1872, c. 255, sec. 2, 17 Stat. 196. This is now found in section 701 of the Revised Statutes, as follows:
>
> " 'The Supreme Court may affirm, modify, or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a

> District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require.' " (Italics ours.)

Practically all the cases which have ordered a re-trial on damages only or on any restricted issue cite this case of *Farrar* v. *Wheeler*, which was decided in 1906.

On this account we wish to emphasize the following points in connection with the case; first, Judge PUTNAM frankly admits that he is transgressing the common law rule; second, he justifies this transgression and the consequent ignoring of the seventh amendment to the Federal Constitution by the language of section 701 of the Revised Statutes, which is not applicable to a Circuit Court of Appeals and which does not specifically empower any appellate court to order new trials upon limited issues only and could not derogate from the seventh amendment to the constitution if it did; and third, the issue to which the new trial was there limited was far more nearly severable than the issue to which new trial is limited in the case at bar.

In so far as section 701 of the Revised Statutes has any bearing on the case at bar, it is reproduced in section 877 of Title 28 of the United States Code Annotated reading in its relevant portion as follows:

> "Whenever on appeal or writ of error or otherwise a case coming from a district court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said

District Court for further proceedings to be there taken in pursuance of such determination."

However, the general language of this section affords no more authorization than its predecessor for limited retrials in Federal tribunals. The history of section 701 of the Revised Statutes is very fully discussed by former Chief Justice WHITE in *Ballew* v. *United States*, 160 U. S. 187, 40 L. Ed. 388, but we believe that some of the language employed by the learned Justice must be reconsidered in the light of this Court's subsequent opinion in *Slocum* v. *New York Life Insurance Company, supra*.

The principal Federal cases outside the First Circuit granting new trials limited to a single issue only are:

Twenty-one Mining Co. v. *Original Sixteen to One Mine*, 254 Fed. 630;

Thorpe v. *National City Bank of Tampa*, 274 Fed. 200;

Chicago, Rock Island & Pacific Railroad Co. v. *Stephens*, 218 Fed. 535;

Fentress Co. v. *Elmore*, 240 Fed. 328.

In *Empire Fuel Co.* v. *Lyons*, 257 Fed. 890, and *Kean* v. *National City Bank*, 294 Fed. 214, Circuit Courts of Appeal refused to grant new trials upon restricted issues.

ENGLISH CASES PRIOR TO 1789.

In an examination of the practice at common law prior to 1789, we have discovered no precedent for an appellate court granting anything other than a complete new trial as to all the issues in a civil case. The English courts of the period clearly recognized their inability to do otherwise.

As early as 1668 we note in *Rolle's Abridgement*, page

722, under the title "Triall", the following report which we reproduce from the Old French:

> "If, in an action of trespass for assault and battery and taking of plaintiff's grain, the defendant justifies as to the battery that it was in defence of his grain, as to which the plaintiff demurs, and as to the grain, the defendant pleads not guilty, in which issue is joined, and which issue the jury finds for the plaintiff, and the jury does not assess damages for the battery, which depends on demurrer, as they should; in this case it seems that if the demurrer should be adjudged for the plaintiff, still the damages for this cannot be supplied and assessed by a writ of enquiry, but a *venire facias de novo* ought to issue to try all because all are included in the original proceeding." (Vashman *v.* Rowe.)

Later on we find *Fern's Case*, H. 27 and 28 Car. II; *Captain Crabb's Case*, M. 23, Geo. S. P.; *Collier* v. *Morris*, M. 1735, Bull. N. P. 326, and *Rex* v. *Poole*, E. 1734, all of which cases are cited and discussed in *Lisbon* v. *Lyman*, 49 N. H. 553.

Captain Crabb's Case and *Collier* v. *Morris* held that where there were several defendants and the verdict as to some was against the evidence, the Court would not grant a new trial as to those defendants because it was said that the verdict must stand or fall *in toto*.

So in the case of *Rex* v. *Poole* where there was one issue out of four as against the evidence, the Court granted a new trial on all the issues holding that a new trial could not be granted on the one issue alone.

Fern's Case was a criminal information exhibited against three defendants and a verdict was rendered

against all three. A new trial was granted to Fern for want of sufficient notice, and judgment confirmed against the other two. This is sometimes cited as an authority contrary to the foregoing, but this is doubtful, as it may well be that the separate retrial of Fern was by consent of the two defendants as to whom notice was sufficient. In any event the rule was certainly as laid down in *Captain Crabb's Case* and this Judge PUTNAM recognized in *Farrar v. Wheeler.*

Continuing chronologically, we have *Bond v. Spark, et al.,* 12 Modern 275 (1700), which we reproduce in full as follows:

> "Assault and battery; Issue joined on *son assault demesne;* two were acquitted, and Spark found guilty; and it was certified by the judge to be against evidence; and motion for a new trial.
>
> "But the Court said, a new trial could not be granted except against all. Whereupon the attorney for the defendants consented for the two defendants who were acquitted, that they should undergo a new trial, and quit the costs which they might have from the plaintiff on their acquittal; and Spark consented to pay the plaintiff's costs.
>
> "And so a new trial was granted against all."

Sir Charles Berrington's Case, 3 Salkeld 362 (1707), which we reproduce in full as follows:

> "In trespass and false imprisonment against several defendants, the plaintiff had a verdict; and afterwards it was moved for a new trial, because as to one of the defendants the verdict was against evidence. *Sed per curiam,* this cannot be done for the court cannot set aside the verdict as to some, and not as to others,

and to grant a new trial as to all would be a prejudice to those who are duly acquitted." Citing Littleton's Reports 164.

In *Parker* v. *Godin*, 2 Strange 813 (1729), we find a note stating:

> "A difficulty arose upon the motion for a new trial, which was this. There were other things besides plate in the declaration, and as to them the verdict pro def. was right; and yet a new trial must be granted upon the whole. But on consideration the court held that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them. But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial."

In *Edie et al.* v. *The East India Company*, reported in 1 W. Bl. 295, and also in 2 Burrows 1216 (1746), the action was on two bills of exchange and verdict was rendered for the plaintiff on one bill and for the defendant on the other. There was a motion for a new trial on the verdict which was for the defendant, as there was an error of law. It was admitted that the verdict for the plaintiff on the other count was correct. Nevertheless a new trial was granted *in toto*. Lord MANSFIELD is reported as saying in the former report:

> "For form's sake, we must set aside the whole verdict."

In the later report (p. 1224), he is quoted as saying:

> "As to the costs, I think there should be none in this case. For the verdict must be set aside *generally*, not in part only."

In *Kay* v. *Panchiman*, 2 Blackstone 1029 (1775), the Court holds, following *Weller* v. *Coish*, decided in 1757, but apparently not reported, that one of two defendants cannot move for a new trial.

In *Swain* v. *Hall*, 3 Wilson 45 (1770), there is a reporter's note as follows:

> "Some days after the Court refused a new trial in this case, the Chief Justice said that it could not have been sent to be tried again upon one of the issues, but it must have gone back on the whole record, viz., upon both the issues; and that one issue being clearly with the defendant, there was no foundation or pretense for a new trial on that issue, and he cited the case of Rowland *v.* Vanhalken, C. B. Easter Term, 1 Geo. 1, from J. Tracey's notes, where it was so determined."

Bacon's Abridgement, Edition of 1778, under the title "Trial (L)", says:

> "If two persons are defendants in an action, and there be a verdict in favor of one of them, the Court will not grant a new trial at the instance of the other; because the verdict must, if set aside, be set aside as to both; and it would be very unreasonable that he in whose favor the verdict is should be a second time in jeopardy. But if the defendant, in whose favor the verdict is, consent to the granting of a new trial, the Court will, provided it be in other respects proper, grant a new trial."

The authorities cited in support of this proposition are *Bond* v. *Spark, supra*, and *Parker* v. *Godin, supra*.

In an edition of *Bacon's Abridgement*, published in Philadelphia in 1813, the above statement of the law is re-

peated with an additional note, citing *Boswell* v. *Jones*, 1 Washington (Va.) 332, *Collier* v. *Morris, supra,* and *Captain Crabb's Case, supra,* and *Fern's Case* as *contra.*

In *Leroux's Case,* cited in this edition, the new trial as to one defendant seems to have gone by consent.

In *Chitty's Edition of Blackstone of 1832,* Volume 2, page 299, a note states that "a new trial cannot be granted in civil actions at the instance of one of several defendants", citing *Bond* v. *Spark, supra,* and *Parker* v. *Godin, supra,* "nor for a part only of the cause of action", citing *Swain* v. *Hall, supra,* and *Edie* v. *The East India Company, supra.*

There are cases decided since 1789 which recognize the rule existing prior thereto.

In *Rex* v. *Mawbey, et als.*, 6 Term Reports 619 (1795), four defendants were tried for a misdemeanor and two were acquitted and two were convicted. The two convicted moved for a new trial and it was objected that a new trial could be granted only as to all defendants which would put those acquitted into double jeopardy contrary to law. The Court expressed the opinion that a new trial could be granted as to those convicted, if necessary, for the purpose of doing substantial justice, but it recognized that this rule was applicable to criminal and not to civil trials, for LAWRENCE, *J.*, says in his opinion:

> "Arguments drawn from civil cases are not applicable to the present; because in those there is only one venire on the record and one assessment of damages; but that is not so in a criminal case."

Chief Justice KENYON appears to assume that the rule is confined to criminal cases, and even counsel for con-

victed defendants (Lord ERSKINE and other notable lawyers of the day) admit the impossibility of a partial retrial in a civil case, saying in the course of their argument:

> "The case of Collier *v.* Morris, which is stated as contravening the former" (Fern's Case, a criminal case), "does not seem to apply; for that was a civil action; and there a plaintiff may have a strict legal interest to maintain the verdict, but that cannot be the case with the Crown, which can only be interested in obtaining substantial justice. And the same observation will apply to the cases in 12 Mod. 275 (Bond *v.* Spark), and 3 Salk. 362 (Berrington's Case), which were both civil actions, the one for assault and battery and the other for false imprisonment."

The case of *Rex* v. *Mawbey, supra,* decided in 1795, is the earliest case squarely recognizing the court's right to grant a partial new trial in a criminal case. The same course seems to have been taken earlier in Fern's Case, but the early case contains no discussion of the right and apparently the point was not raised.

In *Mahoney* v. *Frasi,* 3 Tyrwhitt 264 (1833), a jury had given plaintiff a verdict in an action of trespass. The Court set aside the verdict as excessive and defendant moved to restrict the trial to that issue. The Court said:

> "As the plaintiff has a right to a new trial in respect to circumstances which occurred at the first trial, the inquiry cannot be limited or confined, though had it been only a matter of indulgence it might."

In 1830, we see the Massachusetts court in *Sawyer* v. *Merrill*, 10 Pick. 16, applying the rigorous common law rule that where two defendants in trespass are tried together and one acquitted and the other convicted, a new trial cannot be granted as to the latter, for the verdict cannot be set aside as to the one without being set aside as to the other also.

In *Bicknell* v. *Dorion*, 16 Pick. (1835), Chief Justice SHAW discusses the early English cases and expresses the opinion (p. 483) that the ground of the rule in civil cases is that when a verdict is set aside, a *venire facias de novo* is awarded and no notice is taken of the first *venire* and the proceedings under it and there would be nothing on the record to support the verdict in favor of those who have obtained one. Chief Justice SHAW overrules Sawyer *v.* Merrill, and grants a new trial in this case, saying (p. 483) that, however the rule may be

> "* * * in the English courts, and in those courts which conform strictly to common law practice, we have no difficulty here, because, from the earliest times, we have departed from that practice, no *venire* is awarded in making up the record, and the record is made to exhibit a plain narrative and history of the proceedings as they occur."

The statement of Lord Tenterden in *Bernasconi* v. *Farebrother*, 3 B. & Ad. 372 (1832), is to the same effect. Whatever the reasons for the existence of the rule, there seems to be no question but that it existed, and it is recognized in the earliest American cases.

For instance, in *Boswell* v. *Jones*, 1 Wash. (Va.) 332 (1794), an action of trespass was brought against two de-

fendants. There was a verdict against one defendant and in favor of the other. The defendant against whom the verdict was rendered moved for a new trial and the new trial was granted. It was objected by Bushrod Washington, counsel for plaintiffs and later a Justice of this Court, that a new trial should not be granted on motion of one of the defendants, and the Court says:

> "The cases cited" (Rex *v.* Mawbey, Bond *v.* Spark, Berrington's Case and Kay *v.* Panchiman) "prove that in trespass against two defendants, if one be found guilty, and the other be acquitted, a new trial cannot be granted on the motion of the convicted defendant, and a majority of the court are of opinion that the rule is not without reason, since, the plaintiff being satisfied, it ought not to be in the power of the convicted defendant to bring his co-defendant into jeopardy again by obtaining a new trial. Upon authority, the rule is fixed. One judge doubted as to the reason of it, since the ground of new trials being to attain real justice, if the court perceive that injustice has been done in the acquittal of one defendant, upon principle it would seem right to grant a new trial, from whomsoever the motion might come. And as to authority, the same judge is of opinion, that though uniform decisions which establish the rules of property ought to be adhered to, yet he does not view them as sacred in point of practice, which may be varied as experience shall evince their convenience or inconvenience. But the court are unanimously of opinion, that though in general the subordinate courts need not state the facts on which they ground their opinion for a new trial, yet in this case, when they granted it, against an established rule of practice, they ought to have disclosed

the circumstances which induced them to depart from the rule. * * *"

In *Gardner* v. *Vidal,* 6 Randolph (Va.) 106 (1828), the Court says:

"For these reasons, the judgment must be reversed *in toto,* the verdict set aside, and a *venire de novo* awarded. There is no example of a verdict being set aside as to one issue, and suffered to stand as to others, and trying a cause by piecemeal."

In *Knowles* v. *Dow,* 22 N. H. 387 (1851), the Court said that it knew of no practice existing in New Hampshire which would justify setting aside a verdict in part.

In *Peed* v. *Brenneman,* 72 Ind. 288 (1880), the Court says:

"A new trial implies a re-examination of all, and not a part only, of the issues between the parties as to whom it is granted."

In *Tuttle* v. *Gates,* 24 Me. 395 (1844), the Court says:

"When a case is presented on a motion or petition for a new trial, or for a review, for any cause not arising out of an illegal or erroneous act of the Court, a new trial may be granted or refused by the Court in the exercise of its legal discretion. It cannot be claimed as a matter of right. And in such cases, it may be done upon such terms or conditions imposed, as the Court may consider reasonable. And such appears to have been the practice (Hutchinson *v.* Piper, 4 Taunt. 555, Thwaites *v.* Sainsbury, 7 Bing. 437, Winn *v.* Columbian Ins. Co., 12 Pick. 288). * * * When a case has been reserved on a report of the presiding

judge, or presented by a bill of exceptions, and it has been ascertained, that the instructions of the jury were erroneous, or that illegal testimony was admitted, or that legal testimony material to the issue was excluded, the party, if aggrieved, would seem to be entitled to a new trial as a matter of right; and the court can impose no conditions, unless it has acquired some authority from his consent to dispose of the case otherwise. If the Court may in this class of cases open a case again for the trial of a particular point without disturbing the general verdict, it should possess the power to form a new issue without the consent or action of the parties. Or, if the verdict be entirely set aside, a right to limit the inquiry to a particular point, although other points vitally affecting the merits, and presented as issues to be tried by the pleadings, might be insisted upon. Such a power would scarcely be claimed by a court governed solely by the rules of the common law."

There are state cases which relax the rigour of the common law rule. The most interesting of these are *Bicknell* v. *Dorion, supra,* and *Lisbon* v. *Lyman,* 49 N. H. 553 (1870). It should be noted in this connection that the constitutions of these states contain no such sweeping guaranty of jury trial as that contained in the Federal Constitution.

In *Clark* v. *New York, New Haven & Hartford Railroad,* 33 R. I. 83, 80 Atl. 406 (1911), we call especial attention to the following language of BLODGETT, *J.*, in his dissenting opinion, the correctness of which is not affected by the majority opinion:

"Every English case without exception cited in the majority opinion and decided prior to 1798, shows that

the division of issues on a new trial was conceded to be impossible. That a different view has since prevailed in certain minor English courts, such as before a jury in a Sheriff's Court as expounded by a common pleas decision in 1831, or even if it were authoritatively shown by a decision of the court of ultimate authority in England that a different practice now prevails, are equally beside the mark. It may be a desirable practice and it may later have been adopted in English courts, but it was not so considered or acted upon when this jurisdiction was originally granted in this colony in 1798, and no English case has been cited, even if any exist, which shows the fact to be otherwise, the earliest English case cited in the majority opinion being in 1831."

Cases like *Yazoo & Mississippi Valley Railroad* v. *Scott*, 108 Miss. 871, 67 So. 491, L. R. A. 1915E, 239, recognize frankly that the Court has judicially modified the common law, but this is exactly what a Federal court under the seventh amendment may not do.

We must bear in mind that the seventh amendment is applicable only to Federal tribunals and hence state cases are at best only illustrative of developments from the common law rule. Where the right of partial re-trial is deemed by State courts to exist at all, it is deemed to exist only in cases where the issues are clearly severable and is used sparingly. One of the leading cases is undoubtedly *Simmons* v. *Fish*, 210 Mass. 563. In this case a minor child lost one eye from a shot from an air gun discharged by the defendant's child, and the plaintiff alleged that the injury was due to the negligence of the defendant in permitting his son to have this dangerous plaything. The jury

returned a verdict for the plaintiff in the sum of two hundred dollars and the plaintiff moved for a new trial on the question of damages only. The motion was granted and the defendant alleged exceptions. In sustaining the exceptions, Chief Justice RUGG employed the following language:

> "The ancient common law doctrine that a verdict of a jury was single and indivisible and must stand or fall as a whole was early modified by the custom of this Commonwealth, as is pointed out in Bicknell *v.* Dorion, 16 Pick. 478, 483, where a verdict was set aside as to one of several defendants. The practice has prevailed for many years in this court of awarding a new trial upon a single point *where the error committed in the trial court was of a kind which could be readily separated from the general issues, and applied without injustice to one matter.*
>
> "* * * The Superior Court is a court of general jurisdiction, and it has the power to set aside verdicts and 'order a new trial for any cause for which a new trial may by law be granted' (R. L. c. 173, sec. 112), in which are included excessive or insufficient damages. If it is convinced upon a review of the whole case that the jury have settled the issue of liability fairly and upon sufficient evidence, so that dissociated from other questions it ought to stand as the final adjudication of the rights of the parties, and that there has been such gross error in the determination of damages as requires the setting aside of the verdict, that court has the power to do so, and confine a new trial to damages alone. *It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which*

has crept into one element of the verdict by no means can have affected its other elements.

"* * * It is undoubtedly true that in England there can be no limitation of a new trial to specific issues without consent of both parties. There a new trial means a new trial as to all issues, unless by agreement of parties. Watt *v.* Watt (1905), A. C. 115, overruling Belt *v.* Lawes, 12 Q. B. D. 356, a contrary decision in the court of appeal. The great weight of authority in this country supports the conclusion we have reached.

"* * * *It is only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case. Although we do not say that there cannot be such a case, it is hard to conceive of one.*" (Italics ours.)

The learned justice goes on to cite a number of Massachusetts cases in which the right to a new trial was restricted to single issues of the original action. In all these cases the re-trial was on issues readily severable from the other issues of the case, *e. g.*, whether plaintiff was duly appointed master of a house of correction (*Robbins* v. *Townsend*, 20 Pick. 345), whether a defendant was mentally competent (*Hubbell* v. *Bissell*, 2 Allen 196), the execution of a bond (*Amherst Bank* v. *Root*, 2 Metc. 522), whether according to mercantile usage Smyrna was a port in Europe (*Seccomb* v. *Provincial Ins. Co.*, 4 Allen 152).

Simmons v. *Fish* is followed in the later Massachusetts case of *Waucautuck Mills* v. *Magee Carpet Co.* (1916), 225 Mass. 31, 113 N. E. 573, in which the Court used the following language:

"It is hard to conceive of such a case. It is only when the reason for setting aside the verdict relates solely to damages dissociated from every other contributing, related or vitiating cause that 'the new trial shall be limited to the question of the amount of damages alone.' St. 1911, c. 501. Only by acting on this rule can justice be accomplished. See Opinion of Justices, 207 Mass. 606, 94 N. E. 846. Indeed, it recently has been said that 'partial new trials' is a 'practice * * * not to be commended.' Norfolk Southern R. R. *v.* Ferebee, 238 U. S. 269, 274, 35 Sup. Ct. 781, 59 L. Ed. 1903.

"Order granting new trial to stand."

Other New England states generally have adopted the same rule as that laid down by Chief Justice Rugg in *Simmons* v. *Fish, supra.*

In *McBride* v. *Huckins* (1911), 76 N. H. 206, 81 Atl. 528, the Court said:

"It is impossible to determine on which count of the declaration the damages were assessed, or whether both causes of action were considered by the jury in deciding upon the amount of their verdict. Peabody *v.* Kinsley, 40 N. H. 416. If the erroneous theory of liability adopted at the trial may have been considered by the jury on either count, as having some tendency to enhance the damages, their finding in that respect must be set aside, as well as their finding on the issue of liability. While it is true that when the error found to exist in a trial does not apply to or affect all the issues covered by the verdict a new trial of the entire case is not ordinarily ordered, but only so much of it is set aside as the error related to (Lisbon *v.* Lyman, 49 N. H. 553; Genest *v.* Company, 75 N. H. 365, 74 Atl.

593; Piper *v.* Railroad, 75 N. H. 435, 75 Atl. 1041), it must clearly appear that the effect of the error did not extend to all the issues tried. If the error ostensibly relates to the question of liability, it may still be of such a character as to have had a prejudicial effect on the jury's assessment of damages. If, for instance, it should be erroneously ruled in an action for negligence, that the defendant's previous conviction for theft might be considered on the question of liability, it would require little argument to show that it probably had a very prejudicial effect upon the jury's assessment of damages. While not technically relevant to any question in the case, it could not be said, in the absence of specific instructions not to consider it, that the jury did not make it a substantial element of the damages awarded. It would therefore vitiate the entire verdict."

And see the later cases of *Milford Quarry & Construction Company* v. *Boston & Maine Railroad* (1919), 79 N. H. 525, 107 Atl. 313, and *Dow* v. *Latham* (1922), 80 N. H. 492, 120 Atl. 258.

The rule in Vermont is applied in *LeFebre* v. *Central Vermont Railway Co.* (1924), 97 Vt. 342, 123 Atl. 211; *Parizo* v. *Wilson* (1929), 101 Vt. 514, 144 Atl. 856; *Griffin* v. *Boston & Maine Railroad* (1913), 87 Vt. 278, 89 Atl. 220.

In *Parizo* v. *Wilson*, the most recent case, the Vermont Court says:

"An error may ostensibly relate to one issue only, but be of such a character as to have a prejudicial effect upon the other, and in such a case a full re-trial should be had. Griffin *v.* Boston & M. R. R., *supra.*

> And although an error affects one issue only, a new trial on all issues is to be granted, where this will best subserve the ends of justice. Carpenter *v.* Central Vermont R. C., 90 Vt. 35, 38, 96 A. 373. In order that a partial new trial may be ordered, 'it must clearly appear that the effect of the error did not extend to all the issues tried.' McBride *v.* Huckins, 76 N. H. 206, 213, 81 Atl. 528, 531, 532."

The Rhode Island Court has said recently in *General Motors Truck Company* v. *Shepard Company* (1925), 47 R. I. 153, 130 Atl. 593:

> "The Shepard Company asks that the court modify its order remitting the case of the Shepard Company *v.* Truck Company for a new trial, and direct that such new trial shall be solely upon the question of the plaintiff's damages. We did find sufficient evidence to support the decision of the superior court that the Truck Company was bound by the contract and the warranties contained therein, as claimed by the plaintiff, and in accordance with our practice regarding findings of fact made by a justice of the superior court we held such finding to be without error. There was, however, substantial evidence presented by the defendant denying such liability on its part. In Clark *v.* N. Y., N. H. & H. R. Co., 33 R. I. 83, 80 A. 406, Ann. Cas. 1913B, 356, it was held to be within the authority of this court and the superior court to grant new trials upon the question of damages alone. *In view, however, of the conflicting evidence here upon the issue of liability, we are of the opinion that in justice to the defendant the trial should be a general one upon all the issues.*" (Italics ours.)

The Connecticut Court in *Murray* v. *Kremz* (1920), 94 Ct. 503, 109 Atl. 859, quoted with approval the language of Chief Justice Rugg in *Simmons* v. *Fish* that it is

> "only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case."

The Court then goes on to say:

> "The vesting in a court of such a discretion is a very different matter from according to a litigant asking as of right that a new trial be so limited. A litigant should not be able to select for rehearing the issue decided adversely to him and retain those issues decided in his favor. As a rule, the issues are interwoven, and may not be separated without injustice to one of the parties.
>
> *"The practical difficulty of a rehearing before a new jury, for example, of the issue of damages while retaining the decision of the first jury upon the issue of liability is apparent. Usually these issues will be inextricably interwoven."* (Italics ours.)

For decisions outside the New England states, see *Gregg* v. *City of Wilmington* (1911), 155 N. C. 18, 70 S. E. 1070; *Kessans* v. *Kessans* (1915), 58 Ind. Appeals 437, 108 N. E. 380; *Friesen* v. *Insurance Co.* (1925), 119 Kansas 513, 240 Pac. 414.

IN THE PRESENT CASE THE ISSUE OF DAMAGES IS NOT SEVERABLE OR CAPABLE OF RE-TRIAL ALONE.

We believe that this Court must decide that even if a Circuit Court of Appeals under the Seventh Amendment may under some circumstances order a partial re-trial, it

could not do so in the case at bar without abridging the plaintiff's constitutional rights. For here the issue to be re-tried on the Court's mandate is not clearly severable but is inextricably interwoven with other issues of the case. See *Norfolk & Southern R. R.* v. *Ferebee,* 238 U. S. 269, 273, 59 L. Ed. 1303, 1305; *American Locomotive Co.* v. *Harris,* 239 Fed. 234, 240.

It is true that on the second trial the jury rendered a verdict for the defendant upon its counterclaim for unliquidated damages. It may fairly be inferred that the jury's verdict must have been based upon a finding (*a*) that there was a contractual relation between defendant and plaintiff; (*b*) that said contract was breached by the plaintiff; and (*c*) that the defendant suffered damages certainly and proximately flowing from said breach in the amount of $40,980.59. The jury was not asked to make any specific findings of fact and of course no appellate court would be warranted in making such findings or in imputing to the jurors any conclusions not inevitably involved in their verdict.

For example, there is now no way of telling what the jury thought the contract between the parties was for, whether for the installation of three Cross vapor phase treating towers as argued by the defendant or for one experimental tower as alleged in defendant's pleadings. It is impossible to tell whether the jury rendered its verdict on the defendant's first count alleging the acceptance of an oral proposal made in January 1926 or on the defendant's second count alleging the acceptance of the written proposal of February 6th. It is impossible to tell when the jury thought the contract was entered into or when the jury thought the contract was broken.

It is likewise impossible to tell whether the jury thought that the plaintiff had laid any basis at all for recovering lost profits, because the amount awarded by the jury to the defendant on its counter-claim, $40,980.59, was substantially less than the total of items of damage claimed by the defendant, other than the item of lost profits. These other items were:

Depreciation (Record p. 692)	$55,927.04
Cost Champlin treater (Record p. 255)	26,751.18
Excess cost Champlin treater (Record pp. 255, 733)	5,200.00
Chlorine treating plant (Record p. 357)	6,800.00
Operation chlorine plant (Record p. 693)	20,196.10

It will manifestly be impossible for a new jury to reach any conclusion upon the defendant's damages without knowledge of what the contract was, of when it was made and of when it was breached. A jury in assessing damages must obviously pass upon the obligation of the defendant to mitigate damages. This obligation arises the moment breach has occurred. Hence the necessity for agreement in the minds of the jury upon the date of the breach. Obviously, however, a jury cannot determine when a contract was breached unless it knows what the contract was and when it was made. If this case is to go to a new jury for a new trial on the issue of damages only, how will that jury determine the nature of the contract, the time of its making and the time of breach without having all the evidence which the other jury had in order to reach its verdict?

The verdict of the other jury would be of no assistance to the new jury. It would be improper and exceptionable for the new jury to know what conclusion the previous jury

had reached or by what calculations it had reached its conclusions. It would likewise be improper and exceptionable to ask the new jury to base its verdict upon the language of an opinion of the Circuit Court of Appeals.

It would be a grievous mistake to assume, as the Circuit Court of Appeals for the First Circuit seems to have done, that the granting of a new trial on the issue of damages only would be a short cut towards the ends of justice in this case. Such a limited and restricted re-trial would do more than to infringe merely technical constitutional rights of the plaintiff. It would subject it to the great burden and expense of a re-trial in which a jury would be so confused and confined by the work of its predecessors that no just verdict could result.

II

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS ERRED IN APPLYING THE MAINE LAW OF SET-OFF.

The right to set-off is a purely statutory right. *Smith* v. *Ellis*, 29 Maine 422. The Maine statute applicable to set-off as referred to above is section 75 of Chapter 87 of the Revised Statutes of 1916, reading in full as follows:

> "A demand originally payable to the defendant in his own right, founded on a judgment, or contract express or implied, for the price of real or personal estate sold, for money paid, or had and received, for services done, for a liquidated sum, or for one ascertainable by calculation, may be set off."

It is not contended that this statute does not apply in the case at bar. There is no provision of the Federal statutes or of the rules of the United States District Court for the District of Maine relative to pleadings in set-off, and the

whole subject is undoubtedly governed by the so-called Conformity Act (Section 724 of Title 28 of United States Code Annotated).

The defendant's demand in set-off in the case at bar if it can be justified at all must be justified as a demand "for a liquidated sum, or for one ascertainable by calculation". It will not be contended that the demand is for a liquidated sum. Neither is it for a sum ascertainable by calculation within the interpretation of that language laid down by the Maine courts. How can it be said that the damage suffered by defendant in not having a treating tower or towers which had never been in operation anywhere in the world is to be ascertained by calculation? Calculation under this statute means an arithmetical process performed from known factors, *e. g.*, so many tons at so much per ton, so many bushels at so much per bushel. It does not mean mere estimation or conjecture. In the case at bar the jury, if it is to give the defendant any damages for loss of profits, as the Circuit Court of Appeals says it should, must ascertain what profits were in the contemplation of the parties at the time of making the contract, and how those profits are to be computed. The computation of those profits involves consideration of markets and the difference between price of straight-run and cracked gasoline, the amount of overhead, cost of treating, and many other factors. This is certainly not mere calculation. It is partly conjecture. Indeed the Circuit Court of Appeals has said that an instruction that profits must not be *in any degree* conjectural is too strict. And it is significant that the only computation of profits ever made by

a jury has been held erroneous because they were not allowed sufficient liberty to conjecture.

The defendant's damages in this case are no more to be considered "ascertainable by calculation" than damages in tort for a broken leg. The leading Maine case is *Hall* v. *Glidden*, 39 Maine 445, in which suit was brought to recover for services performed by the plaintiff for the defendant. The defendant endeavored to set off against the plaintiff's claim a claim for rent based upon an implied contract. The Court held that such a claim could not be regarded as a demand "for a sum liquidated, or one that may be ascertainable by calculation", the language of the statute then in force being substantially identical with that of the existing statute. The Court, speaking by Mr. Justice APPLETON, pointed out that there was no "sum liquidated", nor

> "any contract from which, by any calculation, the amount due for rent could be ascertained. The very contract itself and all its terms, were involved in controversy and dispute. The true construction of the words 'sum liquidated or one which may be ascertained by calculation,' contained in R. S., is to limit them to such judgments or contracts only as that the amount of the defendant's demand can only be ascertained by the judgment or contract itself, or by mathematical calculations on the same. Smith *v.* Eddy, 1 R. I., 476."

In the case at bar, as in *Hall* v. *Glidden*, the contract itself and all its terms are involved in controversy and dispute. See also:

Hopkins v. *Megquire*, 35 Me. 78;

Stevens v. *Blen*, 39 Me. 420;

Fletcher v. *Harmon*, 78 Me. 465;
Ruggles Lightning Rod Co. v. *Ayer*, 124 Me. 17.

In *Rogers* v. *Humphrey*, 39 Me. 382, the Court quotes the language of the Court in *Butterman* v. *Pierce*, 3 Hill (N. Y.) 171, as follows:

> "When the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although the damages on both sides are unliquidated; but he can only *set off* where the demands of both parties are liquidated or capable of being ascertained by calculation."

However, there is no question of recoupment in the case at bar because the right of recoupment must spring from the same contract as that sued upon. *Winthrop Savings Bank* v. *Jackson*, 67 Me. 570. In the present case, it does not. Article Fifteenth of the license contract so provides (Record p. 15).

The majority of the Circuit Court of Appeals in its opinion ignore all of the above cases, assert that the defendant's right of counterclaim or set-off is "not to be determined on any narrow or technical construction of the Maine statute" above referred to and cite *Collins* v. *Campbell*, 97 Me. 23, 53 A. 837, *Crummett* v. *Littlefield*, 98 Me. 317, at page 320, 56 A. at p. 1054, *Rodick* v. *Pineo*, 120 Me. 160, 166, 113 A. 45, 49, *Peterson Oven Company* v. *Fickett*, 121 Me. 413, 417, 117 Atl. 575, 578, *Morse* v. *Moore*, 83 Me. 473, *The Gloria*, 286 Fed. 188, 192, *Johnson* v. *White Mountain Creamery Association*, 68 N. H. 437, 36 A. 13, and 34 Cyc. 629, 630, 644.

A glance at these cases will convince the Court that they have not overruled *Hall* v. *Glidden, supra,* and are not aptly cited.

In the first case cited, that of *Collins* v. *Campbell,* there were cross actions based on judgments recovered in the Common Pleas Division of the Supreme Court of Rhode Island. The plaintiffs in *Campbell* v. *Collins* moved that an order be made directing the judgment which might be recovered in that action to be set off *pro tanto* against the judgment recovered in the action of *Collins* v. *Campbell,* except as to the taxable costs in each suit. The Court held that the set-off was a proper one. There would have been no question but that the judgments could have been set off against one another if the same had originally been recovered in the courts of Maine, and the Court held that equity could apply the rule to foreign judgments and that there was no practical reason why it should not have done so.

Crummett v. *Littlefield,* 98 Me. 317, was a bill in equity brought to redeem a mortgage on real estate in which the plaintiff contended that by virtue of the covenant against encumbrances contained in the deed of warranty of the premises given to him by the defendant's intestate, he was entitled to have the amount of certain tax liens outstanding on the mortgaged premises deducted from the amount due on the mortgage and to have a decree only for the balance. The mere statement of the case suffices to show its radical dissimilarity from the case at bar. The Maine Court in the portion of its opinion quoted by the Circuit Court of Appeals and elsewhere deals with the difference between the right of set-off in equity and the statutory right

of set-off but nowhere asserts the right of a court of law to override the statute.

Likewise, in *Rodick* v. *Pineo*, 120 Me. p. 166, the Court was discussing the right to set-off in equity. The language used on pages 166 and 167 of the opinion to which the Circuit Court of Appeals refers is all in reference to an equitable right.

Similarly, the language quoted from *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, and *Merrill* v. *Cape Ann Granite Co.*, 161 Mass. 212, relates to the chancery practice.

The case of *Peterson Oven Company* v. *Fickett, supra*, was an action *in assumpsit* on twenty promissory notes given by the defendant to the plaintiff for the construction of a baker's oven. The defense was failure of consideration due to breach of warranty and the whole case turns on the right of recoupment. It has nothing whatever to do with the right of set-off.

Morse v. *Moore*, 83 Me. 473, is also a case on the alleged breach of warranty of a contract for sale of a certain quantity of ice. It has nothing whatever to do with the right of set-off.

The New Hampshire case of *Johnson* v. *White Mountain Creamery Association*, 68 N. H. 437, 36 Atl. 13, is also a recoupment case involving no question of set-off.

The various cases reported under the title of *The Gloria* in 286 Fed. 188, were admiralty cases decided in the District Court for the Southern District of New York. In so far as the decision relates to the law of counterclaim the question arose in an action brought by the Kingdom of Norway against the Federal Sugar Refining Company.

The defendant sought to counterclaim against the sovereign Kingdom of Norway damages for breach of contract to purchase sugar. The Maine statute was in no way involved and counsel for the Sugar Company expressly contended that under the New York Civil Practice Act it was not limited to claiming on a cause of action arising out of the contract or transaction set forth in the bill of complaint. The Court held, however, that even if this were not true the counterclaim in this particular case could be regarded as arising out of the same transaction as the original complaint, and so the counterclaim was sustainable even as against a sovereign. The Court's historical observations about the nature of the right of counterclaim are in reference to its applicability as against a sovereign state. The Court points out that such rights were unknown to the common law. The statement that "the right of counterclaim and set-off * * * as between litigants is something more than a procedural convenience and is really a requirement of substantive justice" is one with which we have no desire to quarrel.

If the objection to allowing the defendant in this case to proceed by set-off rather than by cross action were procedural merely it would not be entitled to great weight.

But the Maine legislature appreciated, as have other legislatures, that when an unliquidated claim or a claim for an amount not ascertainable on any obvious arithmetical basis is offset against a liquidated claim, the unliquidated claim which may be vague and indefinite as is defendant's claim here gains a certain majesty and definiteness from the claim to which it is opposed. A jury cannot

deal with it on the same terms or appraise it in the same way as if it were an independent suit. This we believe to be the reason for the Maine statute and we see no reason in the case at bar for disregarding the statute or considering it unduly technical. The defendant in this case cannot becomingly seek to import an equity rule on to the law side of the Court, because it resisted and successfully resisted a trial of the case on the equity side of the Court where equitable principles would have been applied by the District Judge. We are not arguing that defendant should not try out its case on this alleged breach of contract in the Maine forum if it likes. The plaintiff came to Maine to sue and is willing to be sued there in a cross action as the Circuit Court of Appeals suggests in next to the last paragraph of its opinion (29 Fed. 2nd, 339). But the plaintiff has consistently objected and still objects under the statute to having this claim vague, indefinite and based on facts far too complicated to be intelligible to an ordinary jury tied hand and foot to the plaintiff's claim in an admitted amount. To set off judgments would involve no injustice. To set off a contested claim against an uncontested one does. The whole argument of the Circuit Court of Appeals based on the injustice of not permitting cross suits in the Maine District misapprehends the basis of plaintiff's objection and is irrelevant.

There is nothing in the passages quoted from *34 Cyc.* which affects the validity of the plaintiff's argument. The two paragraphs cited, one entitled "Counter-claim" and the other "Set-off, counterclaim and defense distinguished", are very general in their language, but it may

be worth while to notice the closing sentence (p. 631) of the former paragraph:

> "But even under the most liberal practice of the codes defendant cannot counterclaim any and every cause of action he may have against plaintiff, without regard to its nature, but only such a cause of action as constitutes a valid counterclaim under the code."

Judge JOHNSON, in his dissenting opinion on the first appeal (29 Fed. 2nd at page 339), holds that "the Maine statute in reference to set-offs is binding" and that the requirement of the statute that the damages must be capable of ascertainment is not merely technical but is substantial. He agrees with the majority opinion in considering that the damages though "not technically ascertainable by calculation" might be so considered by giving a "liberal construction" to the Maine statute, and in so doing overlooks the Maine cases cited above. Judge WILSON, on the other hand, in his brief opinion in 39 Fed. 2nd at page 524, flatly expresses his unwillingness to approve the view that the defendant's claim is a proper account in set-off under the Maine statute. As Judge WILSON was for many years a member of the Supreme Judicial Court of Maine and for some years Chief Justice of that Court, we believe that this Court will consider his dissent on this point of Maine practice authoritative. Taken in connection with the Maine cases cited, *supra*, pp. 49, 50, we believe that this dissent shows the majority of the Circuit Court of Appeals as plainly in error.

Indeed, within six months of its first opinion in this case, the Circuit Court of Appeals for the First Circuit seems to

have reversed itself on this very question. For in the case of *McCallum* v. *Wing*, decided on April 9, 1929, and reported in 31 Fed. 2nd at page 940, the Court was considering a question of set-off under the general laws of Massachusetts (1921), Chapter 232, section 1, which reads as follows:

> "If at the commencement of an action upon a judgment or upon a contract, express or implied, for property sold, for money paid, for money had and received, for services performed and for an amount which is liquidated or may be ascertained by calculation, the defendant has in his own right a claim against the plaintiff such as is hereinbefore mentioned or such a claim which has been assigned to him with notice thereof to the plaintiff, it may be set off against the plaintiff's claim as hereinafter provided."

It will be seen that this language is virtually identical with that of the Maine statute. The somewhat complicated facts at issue are more fully set forth in the earlier opinions in the same case, 254 Fed. 5, 299 Fed. 311, 4 Fed. 2nd, 177, 30 Fed. 2nd, 505. The action was brought to enforce the obligation of a subscriber under a syndicate for subscription for corporate stock and the defendant made a claim of set-off based on an alleged proportional share due to him under his participation certificate from the amount collected by the plaintiff as trustee. Judge JOHNSON says:

> "* * * there are several reasons why the District Court did not err in disallowing defendant's claim of set-off; (1) A claim of set-off must be for a liquidated amount, or for an amount that may be ascertained by calculation. General Laws of Massachusetts, c. 232,

sec. 1. The defendant's claim was not for a liquidated amount, or one ascertainable by calculation."

It is difficult to see the distinction between this case and the case at bar.

The construction which the Massachusetts Court has given to this statute has consistently been the same as that for which the plaintiff contends. See:

Cardell v. *Bridge*, 9 Allen 355;
Montague v. *Boston & Fairhaven Iron Works*, 97 Mass. 502;
Taft v. *Larkin*, 123 Mass. 598;
Barry v. *Cavanagh*, 127 Mass. 394;
Ford v. *Burchard*, 130 Mass. 424;
Tracey v. *Grant*, 137 Mass. 181;
Rice v. *Sanders*, 152 Mass. 108;
Taylor-Stites Glass Co. v. *Manufacturers' Bottle Co.*, 201 Mass. 123.

III.

THE CIRCUIT COURT OF APPEALS IN APPLYING THE OKLAHOMA LAW AS TO INTEREST ON UNLIQUIDATED DAMAGES HAS OVERLOOKED THE OKLAHOMA STATUTE AND CITED AN OKLAHOMA CASE IN SUPPORT OF ITS OPINION WHEN ITS HOLDING IS THE REVERSE.

The applicable Oklahoma statute (Oklahoma Compiled Statutes 1921, Section 5972) reads as follows:

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover in-

terest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

The foregoing language is clear and is made clearer by the following section which allows interest to be given "in the discretion of the jury" "in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice." The natural inference from this statute is that interest is not allowed on claims for unliquidated damages arising out of the breach of contract.

In the face of these statutes, the Circuit Court of Appeals for the First Circuit employed in its opinion the following language:

"We think that the jury should have been instructed to allow interest on any excess cost of any substitute purifier, which the jury found as an element of damages, from the date when the substitute purifier was furnished or should have been furnished (St. Paul Fire & Marine Insurance Company *v.* Robison, 72 Okla. 262); and also might, in their discretion, in order to do full justice between the parties, allow interest on any amount of lost profits which they found due the defendant by reason of plaintiff's breach of contract."

The case of *St. Paul Fire & Marine Insurance Company v. Robison, supra,* decided in 1919 and further reported in 180 Pac. 702, cited as an authority in support of the language quoted, is in fact an authority to the contrary. This was an action brought under a hail insurance policy for damages to a cotton crop. The plaintiff recovered judg-

ment for $146.20. The following excerpt from the opinion is self-explanatory:

> "The court instructed the jury that if it found for the plaintiff that it allow him interest at 6 per cent. from December 1, 1916, on the amounts found, and it is urged by the defendant that said instruction is violative of section 2848, Rev. Laws of 1910. In the case of City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 15 Pac. 859, this court held that interest was not recoverable on unliquidated damages where it was necessary for a judgment on verdict to be rendered in order to ascertain the amount of such damage. The instruction was therefore erroneous, and the judgment was excessive in the small amount of the interest so allowed which is less than $5."

The apparent misapprehension by the Circuit Court of Appeals of the Oklahoma law is important because the Oklahoma law is the law of the place where the contract was made and also the law of the place where the contract was to be performed and is therefore governing as to the measure of damages.

Atwood v. *Walker*, 179 Mass. 514;
Sandham v. *Grounds*, 94 Fed. 83;
Home Land & Cattle Co. v. *McNamara*, 145 Fed. 17;
12 *C. J.* 486.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO WHETHER THE EVIDENCE IN THE CASE WARRANTED ITS SUBMISSION TO THE JURY IS UNTENABLE AND IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY.

We will not take the time for an exhaustive discussion of the testimony relating to the most important question of law in this case as to whether there is any evidence whatever that a contract was ever entered into for the erection by the plaintiff for the defendant of one or more Cross vapor phase system treating towers. We wish, however, to call the Court's attention particularly to the conference of January 27, 1926 as related by Champlin (Record pp. 55-58), by Welling (Record pp. 372-378), by Keith (Record pp. 590-595), the conference on February 6th as related by Champlin (Record pp. 60-64), by Harvison (Record pp. 272-277), and by Keith (Record pp. 592-604), the testimony regarding the execution of the three contracts (Record pp. 76-81, 280-282, 618-620), the conferences of May 18th and 19th in New York (Record, pp. 83, 84, 283-285, 443-444, 620-623), and the testimony of Keith regarding the negotiations which occurred between the parties during the months from June to October of 1926 (Record pages 625 to 635). We believe that this testimony, which except in a few minor details is entirely uncontradicted, establishes beyond a possibility of doubt that there was at no time any express acceptance by the defendant of any offer whatever for the installation of treating towers and that there was no moment of time during these negotiations, at which

there was any intention on the part of the defendant to accept in terms either offer described in its counterclaim.

The testimony clearly shows that the written offer of February 6th was not the offer of the plaintiff (Plaintiff's Exhibit F, Record p. 370, Defendant's Exhibit 65, Record p. 745). These two exhibits are identical. Champlin, the president of the defendant, further testified (Record pp. 162, 163) that the letter of February 6th was not as the Circuit of Appeals had stated in its first opinion, 29 Fed. 2nd, 336, "a re-statement of the offer made by Welling and Keith to Champlin in January" because Champlin alleges that that offer was for three towers instead of for one as stipulated in the letter. There is no evidence whatever of an unconditional acceptance by defendant of any offer, oral or written, on February 6th and we submit that the defendant's whole theory of an implied acceptance on March 20, 1926, at the time of executing the written contracts of any offer, either oral or written, relating to a treating tower is wholly unjustifiable. We submit that the evidence clearly shows that the defendant never was willing to accept unconditionally any offer made it with reference to the Cross vapor phase system of treating unless accompanied by a guaranty that this process would be commercially feasible and would not expose the defendant to patent litigation. That such a qualified acceptance of an offer does not create a contract is a well-recognized doctrine applied in such cases as:

Minneapolis & St. Louis Railroad Co. v. *Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376.

Iselin v. *United States*, 271 U. S. 136, 70 L. Ed. 872.

Martin v. *Northwestern Fuel Co.*, 22 Fed. 596;
Phenix Insurance Co. v. *Schultz*, 80 Fed. 337 (C. C. A. 4th Cir.);
Travis v. *Nederland Life Insurance Co.*, 104 Fed. 486 (C. C. A. 8th Cir.);

and by such Oklahoma cases as:

St. Louis Smelting & Refining Co. v. *Nix*, 101 Okla. 197, 224 Pac. 982,

and cases cited therein.

See also

Williston on Contracts, 1920 Edition, Volume I, Sections 72 and 73.

V.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THAT THE DEFENDANT DID, ON THE WEIGHT OF EVIDENCE, MAKE OUT A CLAIM FOR A SUBSTANTIAL SUM OF LOST PROFITS AS DAMAGES".

The correct rule of law as to damages recoverable for loss of profits has repeatedly been laid down by this Court and by other Federal Courts following the classic English case of *Hadley* v. *Baxendale*, 9 Exchequer 341.

Howard v. *Stillwell & Beirce Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147;
Globe Refining Co. v. *Landa Cotton Co.*, 190 U. S. 540, 47 L. Ed. 1171;
Norfolk Sand & Gravel Corp. v. *Ohio Locomotive Crane Co.* (1914) (C. C. A. 4th Cir.), 217 Fed. 25;
Central Trust Co. v. *Clark*, 92 Fed. 293 (C. C. A. 8th Cir.).;

Sanford Coal Co. v. *Wisconsin Bridge & Iron Co.* (C. C. A. 7th Cir.), 293 Fed. 735.

The plaintiff's position briefly stated is this: that there was no evidence of any understanding between the parties at any time as to damages which would be recoverable for failure to install the treating tower or towers in question. As there was no contract to install such towers, there could have been no understanding at the time of making such a contract and the defendant's attempt to impute such an understanding from a letter (Defendant's Exhibit 1) written a full year before the other written contracts were signed can scarcely be taken seriously. On the contrary, all the evidence shows that the plaintiff made no representations of any kind as to the profits which would have resulted to anyone from the use of this wholly untried and experimental process and practically all the testimony was to the effect that the process would in actual operation have been prohibitively expensive and hence commercially unprofitable (Record pp. 444, 445, 625).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the case remanded to the United States District Court for the District of Maine, Southern Division, for a new trial on all the issues involved.

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August, 1930.

CPT6555